STATE OF NEW YORK
SUPREME COURT : COUNTY OF MONROE

GAY ALLIANCE OF GENESEE VALLEY, INC.,

Plaintiff,

- against - Index No. 8872/91

CITY ASSESSOR, CITY OF ROCHESTER, NEW YORK,

Defendant,

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MONROE

APPEARANCES: ELLEN M. YACKNIN, ESQ. (with SUSAN ANN SILVERSTEIN, ESQ.)
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MEMORANDUM DECISION AND ORDER

ANDREW V. SIRACUSE, J.

Plaintiff Gay Alliance of Genesee Valley ("GAGV") has challenged the denial of its application for a real property tax exemption (Real Property Tax Law § 420-a). The sole issue before the court at this time is its motion under CPLR 3025 (b) for leave to add a cause of action alleging that this denial violated GAGV's constitutional rights (42 USC § 1983). In light of New

York's strong legislative and judicial policy of liberality in allowing such leave, plaintiff's motion is granted.

GAGV states that the additional cause of action can be determined on the same factual material as has already been submitted, and concedes that its sole reason for adding the Federal claim is its hope of recovering attorney's fees, allowed by 42 USC § 1988. The City agrees that no further factual submissions are necessary. Thus, there appears to be no prejudice to the City in permitting the amendment, and precedent binding on this court and recently reiterated holds that

> [a]bsent prejudice or surprise, leave to amend shall be freely granted (Newton v Aqua Flo Co., 106 AD2d 919, 920).

Furthermore,

> Upon consideration of the motion, Special Term should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face (Newton v Aqua Flo Co., supra; see also, Kusak v Allstate Ins. Co., __AD2d__, decided February 5, 1993, case 1678/92 [4th Dept]).

The City's papers raise two objections to the amendment. One, that the facts do not show discrimination because GAGV allegedly does not qualify for an exemption, addresses the merits of the action as a whole rather than the facial sufficiency of the amended pleading. The second, that municipalities can be held liable under 42 USC § 1983 only for acts pursuant to official policy or custom, is simply wrong, and rests on a a discussion of case law so selective as to be misleading. Monell v New York City Dept. of Social Services (436 US 658), the sole

case cited, explicitly declined to set out the boundaries of municipal liability, and it is clear from subsequent cases that they may be liable for acts pursuant to policy or custom or for single acts "by the highest officials responsible for setting policy in that area of the government's business" (City of St. Louis v Praprotnik, 485 US 112, 123). As the City Assessor is charged with determining applicants' entitlement to property tax exemptions, his rejection of GAGV's application might well subject the City to liability if found to be discriminatory.

At oral argument the City raised a further objection, claiming that the Board of Assessment Review should have been sued instead of the assessor. This argument does not address the merits of the pleading but is, in effect, a jurisdictional objection based on a failure to name necessary parties (CPLR 1001, 1003). It is not necessary to speak to the merits of this claim. It is worth noting, though, that this court has authority to add parties on its own initiative (CPLR 1003); in view of the thorough defense mounted by the City there would be no prejudice in adding the Board at this stage in the action. The error, if any, would be a technical one at best.

The motion is granted, with costs. Motion papers having been served upon the defendant, it is therefore

ORDERED that the plaintiff have leave to serve the proposed amended complaint, within five days after service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant have the statutory period after the service of the said amended complaint within which to plead or otherwise move in respect to the same.

Signed this 26th day of February, 1993, at Rochester, New York.

Enter

Andrew V. Siracuse, Supreme
Court Justice